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No. 85-1399

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EDWARD HINES LUMBER COMPANY OF OREGON,
Petitioner,

v.

LUMBER AND SAWMILL WORKERS LOCAL NO. 2588 and
CENTRAL OREGON DISTRICT COUNCIL, LPIW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

ROBIN S. CONRAD
Counsel of Record
PAULA J. CONNELLY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae
Chamber of Commerce
of the United States

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.1, the Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in support of the Petitioner.[1] The Chamber is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. One of the Chamber's principal functions is presenting its members' views in court on issues significant to the business community. In furtherance of this objective, the Chamber has

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[1] This motion is necessary because repeated efforts to obtain the consent of the Respondents have been unsuccessful. The Petitioner has consented to the filing, and its consent letter has been filed with the Clerk of the Court.

filed *amicus curiae* briefs in numerous important labor relations cases.[2]

The case before the Court raises critical questions involving the breadth of arbitrators' authority in interpreting collective bargaining agreements, and the scope of judicial review of such interpretations. Many Chamber members are signatories to collective bargaining agreements containing arbitration, management rights, and no-modification clauses similar to those interpreted in this case. Arbitrators' power to ignore these contractual limitations is of great concern to these businesses.

This Court established broad standards governing labor arbitrators' discretion and judicial review of arbitral decisions 25 years ago in the *Steelworkers Trilogy*. In those and subsequent decisions, the Court stressed the limited scope of judicial scrutiny of arbitration awards, and the importance of arbitration as a means of dispute resolution without court involvement.

The Chamber, like most businesses and business representatives, is vitally concerned about the growing frequency and expense of litigation, and strongly supports the use of arbitration as a voluntary method of settling labor disputes. However, the broad discretion the courts have accorded to arbitrators (whether or not the parties have done so by contract) and the deference they exercise in reviewing arbitration awards have created a process without safeguards, in which the decision of any arbitrator making "noises of contract interpretation"[3] has excellent prospects of judicial enforcement. While the

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[2] *See, e.g., Wisconsin Department of Labor and Industry* v. *Gould,* 54 U.S.L.W. 4228 (U.S. Feb. 26, 1986); *AT&T Technologies* v. *Communications Workers of America,* 751 F.2d 203 (7th Cir. 1984), *cert. granted,* 54 U.S.L.W. 3222 (U.S. Oct. 7, 1985) (No. 84-1913), *argued* (U.S. Jan. 22, 1986); *Pattern Makers League of North America* v. *NLRB,* 105 S. Ct. 3064 (1985).

[3] *Ethyl Corp.* v. *United Steelworkers of America,* 768 F.2d 180, 187 (7th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-670).

Chamber by no means asks the Court to open the entire field of labor arbitration to judicial scrutiny, it urges the Court to furnish the guidance needed by the lower courts to clarify the existing limitations on arbitrators' power.

The decision below is a classic example of the undue deference lower courts pay to arbitrators' "interpretations" of collective bargaining agreements. Here, the Ninth Circuit deferred to the interpretation of an arbitrator who ignored the contract's broad management rights clause and explicit restriction on arbitral authority, and inserted specific terms into the contract. Many lower courts similarly have misconstrued this Court's direction to uphold arbitral awards that "draw their essence" from the contract as mandating virtually absolute deference to arbitrators' discretion.[4] Immediate review is required to resolve this confusion in the circuits, and to instruct the lower courts on the proper standards for reviewing arbitration awards. For these reasons, the Chamber submits this brief and requests that the Court grant *certiorari.*

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record
PAULA J. CONNELLY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae
Chamber of Commerce
of the United States

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[4] In fact, another Petition for Certiorari raising this issue and further demonstrating the difficulty the lower courts are experiencing in reviewing arbitration awards currently is pending before this Court. *Ethyl Corp.* v. *United Steelworkers of America,* No. 85-670 (*see* n.3, *supra*). The Chamber suggests that the Court grant *certiorari* in both cases, and hear them in tandem or consolidated for oral argument, in order to provide the certainty about enforcement of bargained-for contract terms which the business community requires.

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE NINTH CIRCUIT'S FAILURE TO VACATE AN ARBITRATION AWARD THAT VIOLATED THE EXPRESS TERMS OF THE PARTIES' CONTRACT DEMONSTRATES THE PRESSING NEED FOR THIS COURT TO CLARIFY THE STANDARDS GOVERNING ARBITRATORS' DISCRETION AND JUDICIAL REVIEW OF ARBITRAL AWARDS	4
A. Existing Standards: The *Steelworkers Trilogy*	4
B. Abuses Abound Under the "Essence" Test	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Brotherhood of Locomotive Engineers v. *Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914 (7th Cir. 1985) 6

Ethyl Corp. v. *United Steelworkers of America*, 768 F.2d 180 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-670) 5, 6, 7, 8

Holly Sugar Corp. v. *Distillery Workers Int'l Union*, 412 F.2d 899 (9th Cir. 1969) 8

Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984), *aff'd sub nom. International Union, UAW* v. *NLRB*, 765 F.2d 175 (D.C. Cir. 1985) 3

In re Andros Compania Maritima, S.A., 579 F.2d 691 (2d Cir. 1978) 7

International Brotherhood of Electrical Workers, Local Union No. 53 v. *Sho-Me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) 4

International Brotherhood of Electrical Workers, Local Union No. 199 v. *United Telephone Co.*, 738 F.2d 1564 (11th Cir. 1984) 7, 8

Jones Dairy Farm v. *Local No. P-1236, UFCW*, 755 F.2d 583 (7th Cir.), *rev'd on rehearing*, 760 F.2d 173 (7th Cir.), *cert. denied*, 106 S. Ct. 136 (1985) 6

Loveless v. *Eastern Air Lines, Inc.*, 681 F.2d 1272 (11th Cir. 1982) 5, 7, 8

Meyers v. *Parex, Inc.*, 689 F.2d 17 (2d Cir. 1982) .. 7

Miller Brewing Co. v. *Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 912 (1985) 5, 7

Riceland Foods, Inc. v. *United Brotherhood of Carpenters & Joiners, Local 2381*, 749 F.2d 1260 (8th Cir. 1984) (*en banc*), *rev'g* 737 F.2d 758 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2327 (1985) 8

Super Tire Engineering Co. v. *Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 105 S. Ct. 83 (1984) 8

TABLE OF AUTHORITIES—Continued

Page

United Electrical, Radio & Machine Workers of America, Local 1139 v. *Litton Microwave Cooking Products*, 728 F.2d 970 (8th Cir. 1984) (*en banc*) 9

United Steelworkers of America v. *American Manufacturing Co.*, 363 U.S. 564 (1960) 4

United Steelworkers of America v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) 4, 5, 7

United Steelworkers of America v. *United States Gypsum Co.*, 492 F.2d 713 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974) 8

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 4, 5

W.R. Grace & Co. v. *Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983) 4

OTHER MATERIALS

Davey, *The Supreme Court and Arbitration; The Musings of an Arbitrator*, 36 Notre Dame Law. 138 (1961) 9

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The Chamber respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

STATEMENT OF THE CASE

This arbitration case arises out of a grievance filed by the Respondent union against the Petitioner, a lumber company that maintains a number of sawmill and logging

operations in eastern Oregon. The grievance protested the company's use of subcontractors for its logging operations, charging that the company unilaterally had eliminated union-represented employees from the logging crews and replaced them with non-union contractors.[1] Relying on the broad management rights clause in the parties' collective bargaining agreement, the company maintained that it had properly exercised its right to subcontract, and asserted that due to adverse economic conditions, it could not afford to use company loggers.[2]

On appeal of the company's denial of the grievance, the arbitrator found a "past practice" of limited use of subcontractors, and thus imposed a rigid requirement that the company maintain an "average mix of using 60% company loggers and 40% contract loggers," even though the contract contained no restriction on subcontracting. Petition for Cert. at C-30.[3] Despite the contract's explicit limitations on the arbitrator's authority,[4]

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[1] The company in the past had assigned some of its work to union-represented employees, and some to subcontractors. In June 1982, financial conditions forced the Petitioner to close several of its operations, including those in John Day, Oregon. Three months later, the company was financially able to reopen the John Day sawmill and recall 110 employees, but could not afford to recall the company loggers. Instead, it used logging contractors.

[2] The Petitioner directed the lower court's attention to the uncontradicted evidence that the company's economic motives to subcontract were based on the high capital costs of refurbishing and replacing the company's decrepit logging equipment, and the superior efficiency of the subcontractor's operations. *See* Brief of Appellee filed in the Ninth Circuit, at p. 21.

[3] Indeed, the union had attempted unsuccessfully in each of the four prior negotiating sessions to secure such a contractual limit, and had taken three grievances concerning subcontracting to arbitration, without success. *See* Petition for Cert. at 3.

[4] The contract contained a no-modification clause which provided:

> The arbitrator shall have *no authority* to enlarge, diminish, alter or amend the working agreement between the parties and

and its express reservation of all management rights to the company,[5] the arbitrator found an implied obligation not to contract out work in excess of a rough estimate of the average level of contracting over the prior 11 years.[6]

A magistrate for the U.S. District Court for the District of Oregon reviewed the arbitrator's decision, examining the contractual language and the parties' actions, and concluded that the arbitrator had exceeded his authority by limiting the company's right to subcontract. *Id.* at D-10. After *de novo* review, the U.S. District Court adopted the magistrate's decision. *Id.* at E-2. The union appealed this order.

The Ninth Circuit noted initially that judicial review of arbitration awards must be "quite circumscribed." Petition for Cert. at A-6. In considering whether this

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shall confine his decision to interpretation and application of such terms of this Agreement as have been placed in issue by the parties.

Article XI, Section 2, Step 4, Petition for Cert. at C-5, C-6 (emphasis added).

Moreover, the contract's merger clause provided that the contract "constitutes the *sole and entire agreement* between the parties," and "[t]he terms of this Agreement may be supplemented, amended or waived *only by mutual agreement in writing* executed by the parties hereto." Article XX, Section 2, Petition for Cert. at C-6 (emphasis added).

[5] The management rights clause stated:

"*All rights* of management and direction of the business, and the exercise of discretion reasonably related thereto, which have not been *specifically abridged*, delegated, or modified by the Employer under a provision of this Agreement are recognized by the Union as being *retained by the Employer.*"

Article IV, Section 1, Petition for Cert. at C-3 (emphasis added).

[6] As pointed out by the Petitioner, the contract contained no work preservation clause, and the NLRB has held that none can be implied based on wage and benefit or union recognition provisions. Petition for Cert. at 17, *citing Illinois Coil Spring Co.*, 268 N.L.R.B. 601 (1984), *aff'd sub nom. International Union, UAW* v. *NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

award "drew its essence" from the collective bargaining agreement, the court saw its role as limited to "ensur-[ing] that the arbitrator *looked to the words of the contract and to the conduct of the parties.*" *Id.* at A-8 (emphasis added). After such review, the court concluded that it "[could] not say that the arbitrator's award was not a plausible interpretation of the agreement in the light of the parties' conduct." *Id.* at A-10. The company petitioned this Court for review of the Ninth Circuit's decision.

ARGUMENT

I. THE NINTH CIRCUIT'S FAILURE TO VACATE AN ARBITRATION AWARD THAT VIOLATED THE EXPRESS TERMS OF THE PARTIES' CONTRACT DEMONSTRATES THE PRESSING NEED FOR THIS COURT TO CLARIFY THE STANDARDS GOVERNING ARBITRATORS' DISCRETION AND JUDICIAL REVIEW OF ARBITRAL AWARDS.

A. Existing Standards: The Steelworkers Trilogy.

Courts reviewing arbitration awards typically recite the now-engrained principles this Court established in the seminal *Steelworkers* cases.[7] Judicial review of arbitration awards is limited, and a court may not redetermine the merits. *Enterprise Wheel*, 363 U.S. at 596; *W.R. Grace & Co.* v. *Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 764 (1983). The arbitrator's construction was bargained for, and a reviewing court need not agree with it. *Enterprise Wheel*, 363 U.S. at 599; *International Brotherhood of Electrical Workers, Local Union No. 53* v. *Sho-Me Power Corp.*, 715 F.2d 1322, 1326 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

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[7] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 568-69 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-97 (1960).

However, a court may not enforce an award unless it "*draws its essence* from the collective bargaining agreement." *Enterprise Wheel*, 363 U.S. at 597 (emphasis added). This "essence" test is cited by virtually every court reviewing an arbitration award. Indeed, its wording has been described as "somewhat curious but canonical." *Miller Brewing Co.* v. *Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 912 (1985).

B. Abuses Abound Under the "Essence" Test.

While the lower courts uniformly acknowledge the importance of arbitration in the scheme of federal labor law,[8] they have found the "essence" standard of judicial review difficult to apply.[9] Consequently, many accord complete deference to arbitrators' determinations, so long as the arbitrator purports to "interpret" the contract.

The decision below is symptomatic of this overly deferential posture. There, the Ninth Circuit upheld an arbitrator's decision which imposed a specific limitation on the company's power to subcontract, based on "the traditional contract principle that neither party shall do anything which will have the effect of destroying or nullifying the rights of the other party to receive the benefits of the agreement." Petition for Cert. at C-20. Quite apart from ignoring the longstanding basic management

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[8] The expeditiousness and finality of the arbitration process are believed to "defuse the chronic crises that inhere in the labor setting and thereby prevent these crises from developing into labor unrest." *Loveless* v. *Eastern Air Lines, Inc.*, 681 F.2d 1272, 1275 (11th Cir. 1982), *citing Warrior & Gulf*, 363 U.S. at 578-81.

[9] As stated in the Petition for Certiorari in *Ethyl Corp.* v. *United Steelworkers of America*, 768 F.2d 180 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-670) at p. 13, "federal courts are struggling to determine how they can assure that an arbitration award "draws its essence" from the collective bargaining agreement without reviewing the merits of the award."

prerogative of running the business subject only to statutory and bargained-for restrictions,[10] the arbitrator also ignored the explicit terms of the contract, which specifically precluded him from modifying the contract, and reserved to the company *all rights* of management and direction of the business. *See* nn. 4, 5, *supra.*

In reviewing this decision, the Ninth Circuit merely recited the essence test, noted the arbitrator's "inference" that "a tacit agreement existed between the parties" on the 60%-40% subcontracting ratio, Petition for Cert. at A-7, A-8, and concluded that it "[could] not say that the arbitrator's award was not a plausible interpretation of the agreement in light of the parties' conduct." *Id.* at A-10. Thus, the court allowed the arbitrator, under the guise of "interpreting" the agreement, to impose a contractual provision which the union unsuccessfully had attempted to negotiate itself.

The essence test lends itself to such excessive deference; almost any award will contain enough of an interpretation of the contract to "draw its essence" therefrom. Other circuits have misconstrued the test as the Ninth Circuit did here. The Seventh Circuit has held that as long as an award is "based on the arbitrator's interpretation—unsound though it may be—of the contract, it draws its essence from the contract." *Ethyl Corp.*, 768 F.2d at 184. The arbitrator can be "wrong, maybe even clearly wrong; it does not show that he was doing something other than interpreting the contract." *Id.* at 185.[11] The Second Circuit has held that an arbitra-

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[10] *See Jones Dairy Farm* v. *Local No. P-1236, UFCW*, 755 F.2d 583, 584 (7th Cir.), *rev'd on other grounds on rehearing*, 760 F.2d 173 (7th Cir.), *cert. denied*, 106 S. Ct. 136 (1985) ("under existing law, in the absence of agreement to the contrary, the employer remains free to contract out if he so desires, even if the motivation for the decision is a wish to pay lower labor costs").

[11] The Seventh Circuit has repeated this holding several times. *See, e.g., Brotherhood of Locomotive Engineers* v. *Atchison, Topeka*

tion award will not be vacated if the arbitrator explains his decision "in terms that offer even a barely colorable justification for the outcome reached." *Meyers* v. *Parex, Inc.*, 689 F.2d 17, 18 (2d Cir. 1982), *quoting In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 704 (2d Cir. 1978).

Enterprise Wheel thus has been interpreted to prohibit as not "drawing its essence" from the agreement only a decision in which "the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract . . . ." *Ethyl Corp.*, 768 F.2d at 184-85 (emphasis in original). Such extreme judicial deference is particularly problematic where the arbitrator clearly has disregarded the language of the contract. For example, the Eleventh Circuit has held that an arbitrator was not obliged to read a contract literally, even where a literal reading would have precluded the construction he arrived at. *Loveless* v. *Eastern Air Lines, Inc.*, 681 F.2d at 1275.[12]

The Third Circuit recently upheld an arbitrator's reinstatement of an employee undisputedly dismissed for drinking during working hours. Although the contract enumerated this as a cause for immediate dismissal with-

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& Santa Fe Ry. Co., 768 F.2d 914, 922 (7th Cir. 1985) ("an arbitrator's award may be overturned *only if* the reviewing court is convinced that he was not trying to interpret the collective bargaining contract but that instead he resolved the parties' disputes according to his private notions of justice") (emphasis added); *Miller Brewing Co.* v. *Brewery Workers Local Union No. 9*, 739 F.2d at 1163 (court held that the arbitrator's award passed the "not very demanding" essence test, in that "[t]he arbitrator purported to be interpreting the language of the collective bargaining agreement").

[12] *Accord, International Brotherhood of Electrical Workers, Local Union No. 199* v. *United Telephone Co.*, 738 F.2d 1564, 1568 (11th Cir. 1984) (citing *Loveless* for the proposition that "even where an arbitrator's award is contrary to the plain, unambiguous language of the collective bargaining agreement, the award may still 'draw to its essence' from the agreement").

out warning, the arbitrator held that since the employer had not given *notice of its intent to enforce the dismissal conditions strictly*, discharge was too severe a penalty. The court found that the arbitrator's award of reinstatement and back pay was "not irrational," and drew its essence from the contract. *Super Tire Engineering Co.* v. *Teamsters Local Union No. 676*, 721 F.2d 121, 124-25 (3d Cir. 1983), *cert. denied*, 105 S. Ct. 83 (1984). The Seventh Circuit subsequently endorsed this decision, even though it found it to be "a particularly good example of deference to a highly improbable reading of the collective bargaining agreement by the arbitrator." *Ethyl Corp.*, 768 F.2d at 184.

The Eighth Circuit, sitting *en banc*, also recently affirmed enforcement of an arbitrator's award mitigating the discipline a company had imposed on employees, even though the contract specifically precluded him from ruling on the appropriateness of disciplinary measures. *Riceland Foods, Inc.* v. *United Brotherhood of Carpenters & Joiners, Local 2381*, 749 F.2d 1260 (8th Cir. 1984) (*en banc*) (equally divided court), *rev'g* 737 F.2d 758 (8th Cir. 1984) (panel opinion), *cert. denied*, 105 S. Ct. 2327 (1985). And a number of cases hold that explicit "no modification" provisions expressly restricting arbitrators' authority "do not limit to any significant degree" the arbitrator's authority. *United Telephone Co.*, 738 F.2d at 1569, *citing Holly Sugar Corp.* v. *Distillery Workers Int'l Union*, 412 F.2d 899, 904-05 (9th Cir. 1969).[13]

It is apparent from a review of these decisions that the essence standard furnishes insufficient guidance for the lower courts, and under it, they have failed to perform their function of ensuring that arbitrators do not exceed the terms of the contracts they are called upon to inter-

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[13] *See also Ethyl*, 768 F.2d at 186; *Loveless*, 681 F.2d at 1277 n.10; *United Steelworkers of America* v. *United States Gypsum Co.*, 492 F.2d 713, 730 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974).

pret.[14] As one experienced arbitrator has stated, "the parties expect the arbitrator to follow the contract and to eschew the temptation to become a statesman." [15] The law requires no less.

CONCLUSION

The general principles set forth in the *Steelworkers Trilogy* have failed to provide sufficient guidance on judicial review of arbitration awards. The Court should grant this Petition in order to give substance to the "essence" test and require arbitrators to confine their interpretations to the terms the parties agreed to in the contract.

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record
PAULA J. CONNELLY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae
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[14] The severity of the problem is further illustrated by the remarks of Judge Gibson of the Eighth Circuit, in a vigorous dissent joined by three other judges in *United Electrical, Radio & Machine Workers of America, Local 1139* v. *Litton Microwave Cooking Products*, 728 F.2d 970, 974 (8th Cir. 1984) (*en banc*): "The court today does damage to established principles of the law of arbitration. The court mistakenly concludes that 'the award draws its essence from the contract' and overlooks the other important teachings of the *Steelworkers* trilogy. This case, in tandem with *Lackawana Leather Co.* v. *District Union No. 271, UFCW*, 706 F.2d 228 (8th Cir. 1983) (*en banc*), effectively eliminates any judicial review over the concededly broad powers of arbitrators."

[15] Davey, *The Supreme Court and Arbitration*; *The Musings of an Arbitrator*, 36 Notre Dame Law. 138, 140 (1961).